IN THE

Supreme Court of the United States

No. 76-628

TEXAS PETROLEUM COMPANY,

Petitioner,

— against —

COMPANIA PELINEON DE NAVEGACION, S.A.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinion in the United States Court of Appeals for the Second Circuit was handed down on August 6, 1976 and is now officially reported at 540 F.2d 53.

The opinion of the District Court is not officially reported but is set forth in the Appendix to the Petition for a Writ of Certiorari herein. (A 11 *et seq.*).

Jurisdiction

This Court has jurisdiction as set forth in the Petition.

Question Presented

There is no fundamental principle of law which requires review and those principles applied by the Court of Appeals are well established in maritime law and the law of damages.

ARGUMENT

The decision of the court below is correct on the application of well-established principles of law to the facts of this case and is not in conflict with the decisions of other courts of law.

The Court of Appeals, applying well-established principles of law, corrected the errors in the District Court judgment. There is no conflict with the decisions of this Court or other courts nor is there any issue of special or crucial importance presented. The Court of Appeals has not "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision." U.S. Sup. Ct. Rule 19, 28 U.S.C.A.; *Rice* v. *Sioux City Cemetery,* 349 U.S. 70 (1955).

The Court of Appeals for the Second Circuit recognized that:

> "Demurrage, loss of profits from loss of the use of a vessel, traditionally has been an item of damage in maritime tort law." (540 F. 2d. at 55; A5).

See *The Conqueror,* 166 U.S. 110, 125 (1897). The principle is one of *restitutio in integrum,* to place the injured party in the same position he would have been in had the casualty not occurred.

Citing its prior decision in *Petition of Kinsman Transit Company,* 338 F. 2d 708 (2 Cir. 1964), *cert. denied* sub nom. *Continental Grain Co.* v. *City of Buffalo,* 380 U.S. 944 (1965), the Court of Appeals held that the loss of profits sustained by respondent in the period of the charter extension attributed to this casualty was foreseeable, and not remote or speculative. The District Court in ruling to the contrary was in error on the law.

This decision was completely in accord with prior decisions in the Second Circuit. *Petition of Kinsman Transit Company,* 388 F. 2d 821 (2 Cir. 1968), (*Kinsman II*), is clearly distinguished on its facts. There the Court ruled that a third party, far removed from the tort-feasors therein, who suffered a loss by reason of a contractual relationship with a fourth party, even further removed from the tort-feasors, could not recover for the damages suffered because such damages were too remote and indirect from the casualty. 388 F. 2d at 825.

The case before this Court on the petition for certiorari involves a casualty to the ship owned by respondent and operating under a time charter. The casualty was caused by

petitioner. It was clearly foreseeable that the owner of the ship would suffer damages from loss of use of the ship. This included the profits which respondent could have earned during the extension of the charter term attributed to the casualty had respondent been able to operate the ship for its own account. It is a well-established principle of tort law that:

> "... the defendant takes the plaintiff as he finds him and will be responsible for the full extent of the injury even though a latent suceptibility of the plaintiff renders this far more serious than could reasonably have been anticipated. See Prosser, Torts, 260." *Petition of Kinsman Transit Company,* supra, 338 F. 2d. at 724.

As stated in Hart and Honoré, *Causation In the Law,* 1967:

> "Similarly it is settled law that the owners of a ship damaged through defendant's negligence can recover damages on the basis of the actual contract or charter on which she is engaged. This appears to be the case even if the contract contains onerous clauses which make the owners exceptionally vulnerable to delay." (at p. 163).

See also, Harper & James, *The Law of Torts,* Vol. 2, § 20, p. 1147 (1956).

The Court of Appeals correctly applied well-established principles of law regarding foreseeability in reversing the District Court.

The decision below is not in conflict with the decisions of this Court. In *Robins Dry Dock & Repair Co.* v. *Flint,* 275 U.S. 303 (1927) this Court ruled that a time charterer (a third party) could not recover lost profits from loss of use of a chartered vessel damaged by the tort-feasor because the charterer had no property interest in the vessel.

The respondent herein is the owner of the vessel and has the necessary property interest to sustain the right to recover the damages he has incurred from the loss of use of his vessel as a result of the casualty for which petitioner is responsible. The law of *Robins Dry Dock & Repair Co.* v. *Flint, supra,* should not be applied in this case.

The decision below is not in conflict with decisions in other Circuits, nor has petitioner argued that it is. Indeed, in *Skou* v. *United States,* 526 F. 2d 293 (5 Cir. 1976) the Court of Appeals for the Fifth Circuit recently ruled that the shipowner was entitled to recover his loss of profits on facts similar to those in this case. There a ship was off the market for future charters as a result of a casualty.

The decision of the Court of Appeals is not in conflict with the English case of *The Soya,* [1956] 1 Lloyd's Law Reports 557 (Court of Appeal) as stated by petitioner. That case involved a *voyage* charter. In this country, courts apply the "three voyage rule" in determining damages for loss of use of a ship where voyage charters are involved. See, e.g., *Moore-McCormack Lines, Inc.* v. *The Esso Camden,* 244 F. 2d 198 (2 Cir. 1957), *cert. denied* 355 U.S. 822 (1957); *The Tremont,* 161 Fed. 1 (9 Cir. 1908); *The Bulgaria,* 83 Fed. 312 (N.D.N.Y. 1897); *The Nyland,* 164 F. Supp. 741 (D. Md. 1958). The case before the Court on this petition involves a *time* charter, not a voyage charter. Therefore, even if the rule of the English courts as stated the *The Soya,* supra, were followed by our Courts, which it is not, it would not apply in this case.

The District Court erred in denying respondent's claim for damages on the ground that the damages were uncertain. The Court of Appeals in reversing on this point recognized that:

"The uncertainty regarding the damages in this case is only as to their amount." (540 F. 2d. at 55; A6).

The rule regarding certainty of damages was set forth by this Court in *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555 (1931):

"The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." (at p. 562).

This rule was correctly applied by the Court below to remedy the error of the District Court. (540 F.2d at 56; A6). See also, *Crichfield* v. *Julia,* 147 Fed. 65 at 71 (2 Cir. 1906).

The petitioner's assertion (Petition, p. 15) that the "clearly erroneous" rule was violated is wrong. The legal conclusions of the District Court on the issues of foreseeability, remoteness and certainty of damages are not binding upon the Court reviewing those conclusions on appeal. The District Court's mixed ultimate conclusions and conclusions of law (A20 to A32) were based upon an erroneous view of law that uncertainty as to the extent of damages relieves a party liable for the fact of damages. The inapplicability of the "clearly erroneous" rule is succinctly stated by the Fifth Circuit in *Skou* v. *United States,* supra:

"As stated by this Court in *Galena Oaks Corp.* v. *Scofield,* 218 F. 2d 217 (5th Cir. 1954), and cited many times since:

'Insofar, however, as the so-called "ultimate fact" is simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts, it is "subject to review free

of the restraining impact of the so-called 'clearly erroneous' rule."' 218 F. 2d. at p. 219, citing *Lehmann* v. *Acheson,* 3rd. Cir., 206 F. 2d. 592, 594." (526 F. 2d. at 295).

This Court in *Layne & Bowler Corp.* v. *Western Wells Works, Inc.,* 261 U.S. 387 (1923) held that the writ of certiorari should not be granted:

". . . except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." (p. 393)

Here, while the issues involved are of great interest to the parties, no fundamental principles can be established by review in this Court, where the application of the law involved varies with the facts of each case. In *Brooklyn Eastern District Terminal* v. *United States,* 287 U.S. 170 (1932), this Court recognized that the facts of each case will control the measure of damages used to make the injured party whole. This Court held:

"Only when thus enlightened can we choose the yardstick most nicely adjusted to be a measure of reparation, in some instances, no doubt, the hire of another vessel, in other instances, it may be, a return upon the idle capital . . . in others something else." (at p. 174)

The Court of Appeals for the Second Circuit applied that principle in *Sinclair Refining Co.* v. *The America Sun,* 188 F.2d 64 (2 Cir. 1951):

"Whatever the method employed, it should be one that is reasonably adapted to the circumstances of each case so that there will, on the one hand, be no failure to award damages suffered and, on the other, no unreasonable award based upon some theoretical concept of loss." (at p. 66)

Essentially, petitioner seeks another opportunity to present its case for consideration. This Court has held:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. *The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.*" *Magnum Import Co., Inc.* v. *Coty*, 262 U.S. 159, 163 (1923) (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied as no issues of importance to the public are presented and there is no conflict between the decision below and those of other courts.

Dated: New York, New York
November 29, 1976

Respectfully submitted,

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